No. 22361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. Bone, Trustee of the Estate of Kendall Industries, Inc., a California corporation,

Appellant,

vs.

The Pacific Telephone and Telegraph Company,

Appellee.

On Appeal From the United States District Court
Central District of California.

APPELLEE'S ANSWERING BRIEF.

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No. 22341

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APPELLEE'S ANSWERING BRIEF.

Statement of Jurisdiction.

Appellee, The Pacific Telephone and Telegraph Company, does not agree with the jurisdictional statement of the Appellant (Appellant's Op. Br. p. 2). The jurisdiction of the District Court is based on Section 39c of the Bankruptcy Act (11 U.S.C. §67c). The jurisdiction of this Court to review the judgment is based on Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. §§47-48).

The District Court's judgment dissolving the Referee's restraining order determined that the Referee did not have jurisdiction in a summary proceeding to render such an order.

Statement of the Case.

Appellant, A. J. Bumb (hereinafter sometimes referred to as "Receiver") is the duly appointed qualified and acting Receiver of the Estate of Kendall Industries, Inc. (hereinafter referred to as "Debtor") [Clk. Tr.—103, Ref. Finding of Fact 2]. Said Receiver as of the date of the District Court's Order was in possession of the real and personal property of said Debtor and operating the business of said Debtor [Clk. Tr.—103, Ref. Finding of Fact 3]. Appellee, The Pacific Telephone and Telegraph Company (hereinafter referred to as "Pacific") is a public utility corporation duly organized and existing under and by virtue of the laws of the State of California rendering telephone services, including the telephone service hereinafter described, pursuant to tariffs, Rules and Regulations on file with the Public Utilities Commission of the State of California [Clk. Tr.—50, Para. I of Response].

Prior to the filing of the Petition under Chapter XI of the Bankruptcy Act by Debtor herein, said Debtor subscribed for and Pacific installed telephone service under telephone Nos. 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545 at Debtor's place of business in Montebello, California [Clk. Tr. —103, Ref. Finding of Fact 4]. On October 19, 1966, the date upon which bankruptcy proceedings were instituted herein, Pacific was rendering telephone service to the Debtor under said telephone numbers [Clk. Tr. —104, Ref. Finding of Fact 11]. At said time the Debtor was in default under its contract of telephone service by reason of nonpayment of charges then due and owing [Clk. Tr.—51, Para. IV of Response, Clk. Tr.—286, District Ct. Finding of Fact—2].

Pacific notified the Receiver by letter of October 24, 1966 that the services would be discontinued unless the bills then in arrears were paid by October 31, 1966 [Clk. Tr.—53, Para. VII of Response, and Ex. 1]. The Rules and Regulations on file with the California Public Utilities Commission provided that Pacific had the right to discontinue said telephone services upon the giving of at least five days' written notice as to any bill in arrears [Clk. Tr.—56, 59, Ex. "A" to Response, Rule and Regulation 6 and 11].

The Receiver was notified by Pacific that if the Receiver desired to make his own arrangements for telephone services he could do so at the Debtor's address but that if he wished to continue the same services it would be necessary for the Receiver to supersede to the Debtor's services and make arrangements satisfactory to Pacific to pay the amount then in arrears [Clk. Tr.—52, Para. VI of Response; Clk. Tr. —287, District Ct. Finding of Fact 6].

No evidence contrary to Pacific's verified Response [Clk. Tr.—50] and Exhibit 1 (letter of October 24, 1966) was presented to the Bankruptcy Court that sums for telephone service to the Debtor were past due and Receiver's counsel agreed at that time that some amount was due [Rep. Tr. p. 9 of Nov. 17, 1966 hearing]. Receiver's counsel also agreed at the hearing held on June 5, 1967 before the District Court that there was a bill due [Rep. Tr. p. 48, hearing of June 5, 1967; Clk. Tr.—286, District Court Finding of Fact 2].

The specific amounts in arrears for telephone service for each telephone number and the date of each delinquent bill were set forth in Pacific's Response

[Clk. Tr.—51]. Furthermore, a copy of the statement showing the same information was enclosed with the letter of October 24, 1966 [Ex. 1].

Pacific has been and is agreeable to furnishing telephone services to the Receiver under the same telephone numbers which had been assigned to the Debtor only if the Receiver supersedes to the telephone services theretofore rendered to the Debtor making an arrangement acceptable to Pacific to pay outstanding charges against the Debtor's telephone services in accordance with said Rules and Regulations. On the other hand, Pacific has at all times been willing to furnish telephone services to the Receiver under different telephone numbers from those of Debtor without requiring payment of any part of the charges for telephone service incurred by the Debtor prior to the institution of bankruptcy proceedings and without any referral of telephone calls from present telephone numbers of the Debtor to any new telephone numbers for the Receiver [Clk. Tr.—52, Para. VI of Response].

On November 1, 1966 the Receiver filed a verified application seeking to restrain Pacific from discontinuing said telephone service [Clk. Tr.—47] and on the same date the Referee issued a Temporary Restraining Order restraining Pacific from discontinuing telephone services to the Receiver under the telephone numbers which had previously been issued to the Debtor [Clk. Tr.—45]. Pacific filed its Response objecting to the Bankruptcy Court exercising summary jurisdiction and specifically refusing to consent thereto [Clk. Tr.—54, Para. X of Response]. After the hearing before the Referee on November 17, 1966, an order was made and filed on February 6, 1967, which

restrained Pacific from discontinuing telephone services to the Receiver under the telephone numbers being used by the Debtor prior to the institution of bankruptcy proceedings [Clk. Tr.—110] Pacific filed objections to and requested a hearing on the proposed findings of fact, conclusions of law and order, but no hearing was held and only one change was made by the Referee in the proposed findings of fact [Clk. Tr.—122, Ref. Findings of Fact 21]. Although the Referee's Certificate implies that there were some factual issues involved, the Referee, during oral argument on November 17, 1966, viewed the matter as being solely a legal issue [Rep. Tr. p. 28 of Nov. 17, 1966 hearing].

The Receiver states that the telephone service continued uninterrupted after the filing of the Petition under Chapter XI and before the restraining order was obtained (Appellant's Op. Br. p. 8). The record is clear that Pacific attempted to introduce evidence at the hearing before the Referee explaining why the telephone service had not been disconnected prior to the restraining order being issued. The Referee refused to let such evidence be introduced [Rep. Tr. pp. 26 and 27, Nov. 17, 1966 hearing].

Pacific filed on February 15, 1967 its Petition for Review of the Referee's said order [Clk. Tr.—112]. Hearing was held on the Petition for Review on May 1, 1967. Findings of Fact and Conclusions of Law were entered on June 28, 1967 and Judgment was entered on June 29, 1967, which dissolved the order previously made by the Referee [Clk. Tr.—285]. By order pursuant to stipulation of the parties the judgment of the District Court was then stayed pending determination of the Receiver's appeal [Clk. Tr.—294].

Summary of Argument.

The Receiver has no property interest in the telephone numbers previously issued to the Debtor. The Rules and Regulations on file with the California Public Utilities Commission are a part of the contract for service and have the force and effect of law. They specifically provide that a subscriber has no proprietary right in a telephone number. Therefore, the Receiver has not shown and cannot show any basis for the exercise of summary jurisdiction.

The Bankruptcy Court did not have summary jurisdiction over the subject matter of this controversy because this controversy does not involve any property in the actual or constructive possession of the Debtor or owned by the Debtor at the time that bankruptcy proceedings were instituted upon which the Bankruptcy Court could base an exercise of summary jurisdiction.

Even if it were found that summary jurisdiction existed, the Restraining Order issued by the Referee had the effect of allowing the Receiver to adopt the benefits of executory contracts between the Debtor and Pacific without adopting their burdens. Such a result is clearly contrary to established law.

ARGUMENT.

I.

The Bankruptcy Court Did Not Have Summary Jurisdiction Over the Subject Matter of This Controversy.

The decisive issue on this appeal is whether the Bankruptcy Court had jurisdiction to summarily adjudicate the controversy. The court below correctly held that there was no such jurisdiction.

Bankruptcy courts are statutory courts and have only such jurisdiction as is conferred on them by Congress (*Chicago Bank of Commerce v. Carter* (8th Cir. 1932), 61 F. 2d 986, 988, *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 166). In ordinary bankruptcy proceedings the court's jurisdiction to adjudicate controversies summarily is confined to those controversies which relate to property which is in the actual or constructive possession of the court (Bankruptcy Act, §23, 11 U.S.C. §46; *Cline v. Kaplan* (1944), 323 U.S. 97, 98; *Collier on Bankruptcy,* 14th Ed., Vol. 2, pp. 452-459; Ibid. Vol. 8, pp. 166-175). As the Supreme Court stated in *Cline v. Kaplan:*

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Co.,* 309 U.S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' *Galbraith v. Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426 * * *" (323 U.S. 98).

Once it is determined that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit (*Cline v. Kaplan* (1944), 323 U.S. 97, 99). At no point in this proceeding has it been suggested that Pacific's claim is frivolous.

These fundamental and well-established principles of bankruptcy jurisdiction have been consistently applied. In *In re Adolf Gobel, Inc.* (2nd Cir. 1936), 80 F. 2d 849, 852, the debtor-in-possession in a section 77B proceeding sought by motion to enjoin the General American Tank Car Corporation from prosecuting an action in an Illinois court against an Iowa corporation whose common stock was wholly owned by the debtor. The Illinois action was for breach of a car leasing contract between General American and the Iowa corporation. The court held that there was no jurisdiction to enjoin the prosecution of the Illinois action because it did not interfere with any property owned by or in the possession of the debtor. The same question was presented in *In re Journal-News Corp.* (2nd Cir. 1951), 193 F. 2d 492, where on motion of the debtor-in-possession in a Chapter XI proceeding the District Court enjoined the sale of stock of the debtor corporation pursuant to contracts between the debtor's stockholders and the purchasers. The court reversed, holding that:

> "The bankruptcy court has exclusive jurisdiction of the debtor and his property. 11 U.S.C.A. §711. But the debtor has no property interest in the shares of its stock owned by its stockholders. Consequently the court had no jurisdiction to restrain disposal of their stock." (193 F. 2d 492).

These decisions compel the conclusion that the Bankruptcy Court was without jurisdiction summarily to adjudicate this controversy.

A. Appellant Had No Proprietary Interest in the Telephone Numbers.

There is no issue in this case as to appellant's right to receive telephone service. The sole issue is whether the bankrupt had a property interest in certain telephone numbers. The Rules and Regulations applicable to the telephone service in question expressly provide that:

> "The assignment of a number to a subscriber's telephone service will be made at the discretion of the Company. The subscriber has no proprietary right in the number * * *" [Clk. Tr.—62].

This Rule—on file with the California Public Utilities Commission—is part of the contract for services, has the force and effect of law, and is binding upon both Pacific and its subscribers.

Hischemoeller v. Nat. Ice etc. Storage Co. (1956), 46 Cal. 2d 318, 324-328, 294 P. 2d 433, 437-438;

J. Breuner Co. v. Western Union Tel. Co. (1930), 108 Cal. App. 243, 250, 291 Pac. 445, 448-449;

Western Un. Tel. Co. v. Esteve Bros. & Co. (1921), 256 U.S. 566, 571-572.

The identical Rules and Regulations involved in the instant case were involved in *Slenderella Systems of Berkeley v. Pacific T. & T. Co.* (2nd Cir. 1961), 286 F. 2d 488, wherein the identical jurisdictional question

here involved was before the Court of Appeals for the Second Circuit. Eleven debtors-in-possession sought an order enjoining Pacific from changing the telephone numbers assigned to them or, in the alternative, if new telephone numbers were assigned to them, that an order be made directing Pacific to furnish, on a referral basis, the new numbers so assigned to persons calling the old numbers. The court held that, since a subscriber has no proprietary right in a telephone number under California law and under the contract between the parties, "[t]he telephone numbers were thus not property of each debtor such as to give the Bankruptcy Court summary jurisdiction" (286 F. 2d 490). The court noted that:

> "The license to use a specific telephone number does not amount to the possession required as a basis for summary jurisdiction" (286 F. 2d 490).

In relation to the question whether the contract between the parties gave rise to property rights within the meaning of the Bankruptcy Act, the court held:

> "* * * if the debtors are to have recourse for [an alleged] violation of a contract right, it must be by way of a plenary action. Where a substantial issue of law or fact exists as to title, and where the debtor was not in physical possession of the property on the date of filing his petition, the rights under the contract should not be settled in a summary proceeding [citing cases]. Thus, there being no property of the debtor involved in this controversy, the Bankruptcy Court does not have summary jurisdiction" (286 F. 2d 490).

The Receiver points out that there is no tariff that requires the telephone company to give or not to give

referral service (Appellant's Op. Br. p. 8). In the *Slenderella* case the debtors-in-possession also through a summary proceeding unsuccessfully sought referral service as an alternative to retention of the same telephone number. Referral service in lieu of following the supersedure regulations is an obvious circumvention and violation of the supersedure regulations.

B. Appellant Has Not Shown, and Cannot Show, Any Basis for the Exercise of Summary Jurisdiction by the Bankruptcy Court.

It is therefore clear that a telephone subscriber has no proprietary interest in a telephone number so as to support the exercise of summary jurisdiction by the Bankruptcy Court. The dictum which appellant quotes in support of his erroneous assertion that there is a protectible property interest in telephone numbers under the law of California (Appellant's Op. Br. p. 15) states only that equity will protect certain personal rights as well as property rights (*Orloff v. Los Angeles Turf Club* (1947), 30 Cal. 2d 110, 116-118, 180 P. 2d 321, 324-325). It does not define those rights or the term "property." It therefore provides no basis whatever for the exercise of summary jurisdiction.

Appellant attempts to avoid the controlling California law and the decision of the Second Circuit in the *Slenderella* case on two grounds. He erroneously asserts (1) that the California law is in "conflict" with the Bankruptcy Act, and (2) that the contract between Pacific and its subscribers is an invalid "contract of adhesion."

(1) Appellant acknowledges that "it is normally true that the ownership of property ordinarily depends

upon state law" (Appellant's Op. Br. p. 17). Appellant then infers (p. 17) that there is some "conflict" between the Bankruptcy Act and the applicable California law. Appellant's main argument in this regard appears to be based upon his erroneous assertion that a telephone number is "property" which can be "transferred" and that it therefore falls within section 70(a)(5) of the Bankruptcy Act (see Appellant's Op. Br. pp. 20-25). To support this assertion, appellant ironically relies (p. 21) upon a portion of the very Rules and Regulations governing telephone service which he seeks to avoid. However, the applicable Rule [Rule and Regulation 23(b); Clk. Tr.—63] does not provide for transfer of a telephone number. It provides a procedure under which an applicant for services can obtain the same telephone number as a present subscriber when that subscriber is discontinuing the service—provided that the applicant is to take service on the same premises, that both give written notice to that effect, and that an arrangement satisfactory to the telephone company is made by the applicant to assume all the obligations of the outgoing subscriber.

Appellant places great reliance upon cases which held that a membership in a board of trade was property which passed into the possession of the court (*Chicago Board of Trade v. Johnson* (1924), 264 U.S. 1; *Board of Trade of City of Chicago v. Weston* (7th Cir. 1917), 243 Fed. 332). However, in each of those cases it was undisputed that the board rules permitted transfer of the membership to any eligible party (264 U.S.

7, 11; 243 Fed. 334, 336). Moreover, those very cases also held that the property in question passed subject to and encumbered by the applicable rules and regulations of the board (264 U.S. 14-15; 243 Fed. 336). Thus, they do not, as appellant erroneously asserts, demonstrate "[t]hat such tariffs [as are applicable in this case] are not binding upon the Bankruptcy Court" (Appellant's Op. Br. p. 32). On the contrary, the cases in question recognize the validity of encumbering restrictions. Such restrictions are no less valid in the instant case.

Appellant also places reliance upon the cases of *Segal v. Rochelle* (1966), 382 U.S. 375; *Barutha v. Prentice* (7th Cir. 1951), 189 F. 2d 29; and *Garber v. Bankers' Mortgage Co.* (D.Kan. 1928), 27 F. 2d 609. None of those cases involved the question of summary jurisdiction. Each was concerned solely with the question of whether a particular transferable interest passed to the trustee or whether it passed to the bankrupt.

(2) In another attempt to avoid the binding effect of the applicable Rules and Regulations, appellant erroneously argues that the contract between Pacific and its subscribers is an unreasonable "contract of adhesion" under California law (Appellant's Op. Br. pp. 27-33). However, the theory of "contract of adhesion" is not applied to public utilities regulated by governmental agencies such as the California Public Utilities Commission (*J. Breuner Co. v. Western Union Tel. Co.* (1930), 108 Cal. App. 243, 250-251, 291 Pac.

445, 448-449). And, as pointed out (*supra,* p. 9), it has been expressly held in California that such Rules and Regulations are a valid part of the contract between the parties and are binding upon both the subscriber and Pacific.

Furthermore, recent history demonstrates that the California Public Utilities Commission has and does investigate the reasonableness of Rules and Regulations governing telephone service and that it may and does change or disapprove them (see *California Telephone Corporation,* Dec. No. 69447 (1965), 65 Cal. P.U.C. 526, monitoring; *Pac. Tel. & Tel. Co.'s Rules,* Dec. No. 69942 (1965), 65 Cal. P.U.C. 103, limitation of liability; *P.T. & T. Co.,* Dec. No. 70839 (1966), 65 Cal. P.U.C. 661, wide area telephone service). The very Rule and Regulation—that "[t]he subscriber has no proprietary right in the [telephone] number"—which appellant seeks to evade was approved by the California Public Utilities Commission. In *Crocker Hotel Co. v. Pacific Tel. and Tel. Co.,* Dec. No. 35238 (1942), 44 C.R.C. 127, 128, the commission noted:

> "Similar rules are uniformly approved by state regulatory bodies as essential to the maintenance of efficient service to telephone subscribers generally."

The Commission indicated (44 C.R.C. 128) that, in an appropriate case, it would examine the reasonableness of the applicable Rule and Regulation, as well as the question whether the telephone company might have acted in an arbitrary or capricious manner. Thus, any

question as to its propriety and reasonableness should first have been addressed to the California Public Utilities Commission. In the absence of any such challenge directed to the Commission, the reasonableness of the applicable Rule and Regulation is conclusively established (*Morse v. Pacific Gas & Elec. Co.* (1957), 152 Cal. App. 2d 854, 859, 314 P. 2d 192, 195).

And, contrary to appellant's assertions (Appellant's Op. Br. p. 31), the reasonableness of the Rule in question is manifest. If a subscriber could obtain a proprietary interest in a telephone number, telephone companies would of necessity be required to undertake the obviously vast and difficult task of keeping track of developed and developing "rights" in various telephone numbers. The assignment of telephone numbers would become increasingly more complex and telephone companies would inevitably become involved in litigation regarding respective "rights" in telephone numbers. The California Public Utilities Commission has determined that such results should be avoided. The reasonableness of that determination cannot be called into question in this proceeding.

Thus, appellant has failed in his attempt to assail the controlling California law and the contract between the parties. He has not shown, and cannot show, any basis for the exercise of summary jurisdiction. As the Second Circuit held in the *Slenderella* case:

> "The summary jurisdiction of the Bankruptcy Court does not extend to 'all litigation between the debtor and third persons.' [citing cases] If appellants have a remedy it is by way of a plenary action and not a summary procedure before the Bankruptcy Court" (286 F. 2d 491).

II.

The Bankruptcy Court Did Not Have Summary Jurisdiction to Compel Performance of a Contract Which Is Subject to Termination.

The Receiver argues (Appellant's Op. Br. p. 41) that he needs time to determine whether it is in the best interest of the bankrupt estate to assume the contract for telephone services. But the Bankruptcy Court did not have jurisdiction to compel performance of a contract which is subject to termination and which Pacific sought to terminate and would have but for the issuance of the restraining order. The Bankruptcy Court cannot take away the right of the other party to a contract to terminate that contract when it has been materially breached by the Debtor.

On October 24, 1966 prior to the issuance of the Temporary Restraining Order made on November 1, 1966, Pacific gave to the Receiver written notice of termination of its telephone service contracts with the Debtor and disconnection of that service unless the Receiver availed himself of the supersedure procedure [Ex. 1]. The right of Pacific to terminate the contract is recognized by principles of contract law and is required by Rules and Regulations on file with the Public Utilities Commission.

The Bankruptcy Court does not have summary jurisdiction to require Pacific to perform the contract where the Debtor is in default under the contract.

In Re Ballou (D.C. Ky. 1914), 25 Fed. 810, 813;

Texas & N. O. R. v. Phillips (5th Cir. 1954), 211 F. 2d 419, 420;

Collier on Bankruptcy, 14 Ed., Vol. 2, p. 1432, *et seq.*

The Receiver's application for the Restraining Order spoke in terms of needing time to decide whether to accept or reject the executory contract. Section 313 of the Bankruptcy Act under Chapter XI, only provides that the court may permit the rejection of executory contracts of the Debtor. A receiver under Chapter XI where the debtor is in default of contract obligations cannot rightfully prevent the exercise of the legal right of the nondefaulting party to terminate the contract (*Urban Properties Corporation v. Benson, Inc.* (9th Cir. 1940), 116 F. 2d 321, 325). As the leading commentator states in reference to Section 313:

> "The jurisdiction given by §313(1) to permit the rejection of executory contracts of the debtor does not affect the right, if any, of the other party to the contract to terminate the same. If the contract provides that upon the happening of a certain event such as the filing of a petition under the Act by either party, the other party has an option to terminate the contract, then upon the occurrence of that event the other party may exercise his option. Or, if the debtor has defaulted in performance, and the breach is such as would entitle the other party to terminate the agreement under ordinary principles of contract law, then the other party to the contract may terminate the same. In either event if the contract has been ter-

> minated by the election of the other party, there is no longer in existence an executory contract which can be either rejected or assumed."
>
> *Collier on Bankruptcy,* 14th Ed., Vol. 8, pp. 225-226.

In effect, the Receiver sought to reject an executory contract in part and assume it in part, that is, the Receiver sought to assume the executory contract as to the particular telephone numbers involved but tried to reject the executory contract insofar as it provided that such numbers were subject to disconnection. An executory contract cannot be rejected in part and assumed in part (*In Re Klaber Bros., Inc.* (S.D.N.Y. 1959), 173 F. Supp. 83, 85).

> "An executory contract cannot be rejected in part and assumed in part. The debtor, or the trustee, is not free to retain the favorable features of the contract and reject only the unfavorable ones. Assumption carries with it all of the burdens as well as the benefits of the contract. The contract must be rejected in its entirety, or not at all."
>
> *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 228.

The Receiver argues that Section 70b of the Bankruptcy Act was a sufficient basis upon which to permit the court to restrain Pacific from disconnecting the service until the Receiver had decided whether or not to assume the executory contract. Section 70b is not applicable to this case. In any event both the benefits

and the burdens must be assumed (*In Re Mesa Steel Corp.* (D. Ariz. 1964), 229 F. Supp. 669, 673; *In Re Swindle* (D. Ore. 1960), 188 F. Supp. 601, 604). The leading commentator states:

> "The legislative purpose back of §70b is to solve the problem of *assumption of liabilities.* It is conceivable that a system of bankruptcy law might compel the non-bankrupt party to a contract, the performance of which is incomplete as to both contracting parties, to continue performing while for the counterpart refer him to a mere dividend out of the estate. *Needless to say, such a solution is neither wise from the viewpoint of commercial credit, nor fair from the viewpoint of equity. It neglects one of the basic principles of equity, mutuality of obligation and performance.* What §70b actually proposes to do is precisely to secure this continued mutuality wherever it is felt to be of greater benefit to the estate to proceed in accordance with the bankrupt debtor's plan rather than to freeze his commercial relations as of the filing date. The price for securing the potential margin of benefit to the estate is high. It is nothing short of complete mutuality, that is assumption by the estate of the bankrupt's liabilities, not as a matter of granting a distributive share, but by performance in full, just as if bankruptcy had not intervened."
>
> *Collier on Bankruptcy*, 14th Ed., Vol. 4A, p. 524.

III.

Appellant Is Entitled to No Different Treatment Than Any Other Subscriber to Telephone Service.

The Receiver argues (Appellant's Op. Br. p. 36) the Bankruptcy Court is ousted of its jurisdiction if the Rules and Regulations on file with the California Public Utilities Commission concerning disputed bills are followed. This argument is fallacious.

First of all there is no issue over a disputed bill. The Receiver's counsel admitted some sum was due [Rep. Tr. p. 9 of Nov. 17, 1966 hearing; Rep. Tr. p. 48 of June 5, 1967 hearing] and the Receiver would not offer to pay the sum which was past due whatever the amount. The Receiver argues (Appellant's Op. Br. pp. 37-38) that the amount claimed by Pacific as being due in Pacific's letter of October 24, 1966 to the Receiver [Ex. 1] is at variance with the amount set forth in Pacific's Response. The Response of Pacific on its face showed the date of each delinquent bill for each telephone number and the specific amount due for each bill [Clk. Tr.—51]. The specific amounts set forth when added together show a total of $2,006.80. The total amount claimed in the same paragraph in the Response is $3,980.36, which was an inadvertent error. At no time did the Receiver or his counsel ever point out the discrepancy in Pacific's Response until the Receiver filed objections to the first proposed findings of fact, conclusions of law and judgment of the court below in May of 1966 after the

court below had indicated it would dissolve the Referee's order. Also, the letter of October 24, 1966 [Ex. 1] refers to a bill enclosed therewith. The bill lists the telephone numbers and the amounts due and the dates of the delinquent bills which were subsequently set forth in the Response. Unfortunately, the total shown on the statement was in error but the error would be manifest as soon as the specific amounts for each telephone number were added. Obviously, if only the amount was in question, that would have been resolved long ago.

Second, the Receiver wants to continue telephone service under the same telephone numbers formerly being used by the Debtor and the Receiver is just like any other subscriber in relation to the Regulations and Rules on file with the California Public Utilities Commission. The Receiver is entitled to no better treatment than any other member of the public and current service being used by him is subject to those Rules and Regulations. For Pacific to do otherwise would involve illegal discrimination in favor of the Receiver. Third, if the Receiver had requested telephone service over a new number, he would be bound by all of the Regulations and Rules and tariffs concerning such service. If he failed to pay for the service, he would be subject to disconnection. If he disputed the amounts of the bill, he would be bound to follow the tariffs and pay the amount of the bill to the Public Utilities Commission in accordance with the tariffs. This is not ousting the Bankruptcy Court of jurisdiction. This is

simply a matter of contract law and if the Receiver enters into contracts or assumes contracts, he is bound by them and if not, then he is subject to whatever remedies the other contracting parties may have without regard to the pendency of the Bankruptcy proceeding. *Urban Properties Corporation v. Benson, Inc.* (9th Cir. 1940), 116 F. 2d 321, 325; *In Re Mesa Steel Corp.* (D. Ariz. 1964), 229 F. Supp. 669, 673; *In Re Swindle* (D. Ore. 1960), 188 F. Supp. 601, 604; *In Re Klaber Bros., Inc.* (S.D.N.Y. 1959), 173 F. Supp. 83, 85). 28 U.S. Code, Section 949(a) provides that the Trustee or Receiver may be sued without leave of court with regard to any acts or transactions in carrying on the Debtor's business.

The Receiver further argues (Appellant's Op. Br. p. 32) that the "property", that is the telephone numbers, was in the possession of the Debtor at the time the Chapter XI proceeding was filed. The telephone number is an intangible. This is admitted by the Receiver [Clk. Tr.—156]. The telephone numbers were not in the physical possession of the Debtor. The telephone number is an incident of the telephone company's switching system. The switching system is located in Pacific's central offices, all of which are owned, occupied and possessed solely by Pacific. There is nothing in the telephone instrument or lines located on the Debtor's property which has anything to do with the telephone number itself [Rep. Tr. p. 76 of June 5, 1967 hearing]. Pacific is engaged in providing telephone service unlike other utilities which provide commodities such as electricity, gas and water.

IV.

The District Court Properly Modified the Referee's Findings of Fact, Which Were Erroneous Legal Conclusions, Irrelevant or Inconsistent With Other Findings.

Contrary to the assertions of the Receiver (Appellant's Op. Br. p. 41), those of the Referee's Findings which were modified by the District Court were not factual findings but were erroneous legal conclusions, were irrelevant to the legal issues before the court, or were inconsistent.

As shown by the very cases cited by the Receiver, a referee's legal conclusions are not binding on the District Court. *Lundgren v. Freeman* (9th Cir. 1962), 307 F. 2d 104, 115. Where the question is one of law, the findings may be set aside. (*Kwikset v. Hillgreen* (9th Cir. 1954), 210 F. 2d 483, 488. Therefore, the District Court was free to reject or modify the Referee's legal conclusions. Merely applying the label of "Findings of Fact" does not make facts out of legal conclusions.

The other cases cited by the Receiver are inapplicable. Thus, in *In Re California Associated Products Co.* (9th Cir. 1950), 183 F. 2d 946, 949, the court merely held that factual findings supported by the record were not to be disturbed absent abuse of discretion. The case is not in point because the findings modified by the District Court in our case were legal conclusions.

In *Earhart v. Callan* (9th Cir. 1955), 221 F. 2d 160, 164, the court held that the trial court could enter the referee's findings as its own. The case has nothing to do with the power of the District Court to modify a referee's findings.

The case of *Ott v. Thurston* (9th Cir. 1935), 76 F. 2d 368, 369, simply holds that it was proper for the District Court to follow a referee's findings made on a disputed factual issue. The case of *Ingram v. Lehr* (9th Cir. 1930), 41 F. 2d 169, 170, is to the same effect as the prior case.

The court in *Snider v. England* (9th Cir. 1967), 374 F. 2d 717, 720, refused to draw its own inferences from undisputed facts. However, the undisputed facts involved a question of whether a transfer was preferential. The case is unrelated to the issue presented by our case.

In Re Cummins (S.D. Cal. 1949), 84 F. Supp. 65, involved factual disputes resolved by the referee.

In *Lundgren v. Freeman,* 307 F. 2d 104 (9th Cir. 1962), the court ruled that it was bound by the District Court's reasonable inferences drawn from facts established by documentary evidence. The court stated, however, in its opinion at page 115 as follows:

> "A finding of fact, to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct'. A conclusion of law would be a conclusion based on application of a legal standard. Many Ninth Circuit cases espousing the *Frank* view are explainable as applying the rule that courts of appeal need give no weight to a trial court's conclusions of law." (307 F. 2d 115)

Thus, in the instant case, the District Court could modify legal conclusions of the Referee. In fact the Referee agreed that only a legal issue was involved [Rep. Tr. p. 28 of Nov. 17, 1966 hearing]. The rele-

vant facts are not in dispute. They are simply that there were charges past due for telephone service, that Rules and Regulations on file with the California Public Utilities Commission governing telephone service required supersedure if the same telephone numbers were to be maintained at the same premises, and provided that the telephone numbers are not property owned by the Debtor.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment should be affirmed.

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Certificate.

I certify that in conection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD D. DELUCE